

Petitioners Marlene Okulick, John Okulick, Louis Traeger, the Roger and Jean-Marie Webster Trust, Kendell Shaffer, Jefferson Eliot, and Kevin Ragsdale seek a writ of mandate to compel Respondents City of Los Angeles ("City") and Venice Beach Business Improvement District ("Venice BID" or "District") to (1) set aside the ordinance establishing the Venice BID, (2) contest the assessment levied against City-owned properties in the Venice BID, and (3) order the Venice BID to redraw its boundaries. Petitioners also seek declaratory relief stating that the Venice BID violates the law.

The court has read and considered the moving papers, opposition, and reply, as well as the supplemental papers, and renders the following tentative decision.

A. Statement of the Case

1. Petition

Petitioners commenced this proceeding on December 8, 2016. The verified Petition alleges in pertinent part as follows.

On November 8, 2016, the Los Angeles City Council ("City Council") passed an ordinance establishing the Venice BID. Pet. ¶1. Impacted property owners will pay approximately \$10 million in special assessments over the next five years for services that many of them do not want or need. Pet. ¶2. While BIDs are designed to benefit businesses by providing services designed to boost foot traffic and revenue, many of the properties encompassed by the Venice BID are residential. *Id.* Petitioners are owners of residential property in the Venice BID and subject to its special assessments. *Id.* The Venice BID was foisted upon Petitioners and those in like position and has forced them to subsidize the commercial activities in their neighborhood through its special assessments. Pet. ¶16.

The Management District Plan ("Plan") and the accompanying Engineer's Report for the Venice BID describe the three primary services the Venice BID will provide: (1) Clean and Safe Programs; (2) District Identity & Special Projects; and (3) Administration and Management. Pet. ¶23.

The Clean and Safe Program accounts for 73 percent of the annual budget. Pet. ¶24. The Safe program aims to enhance the safety of the Venice Boardwalk and neighboring community. *Id.* This program encompasses all patrol/ambassadorial services in the Venice BID. *Id.* This program offers a quintessentially general benefit to all — property owners, non-property owners and visitors alike. Pet. ¶25. The proportionate benefit of safety cannot be calculated and assessed to a specific property as Proposition 218 ("Prop 218") requires. *Id.*

The District Identity & Special Projects ("District Identity") program accounts for 7 percent of the annual budget. Pet. ¶26. This program is aimed at promoting the neighborhood through newsletters and media relations as an appealing place to shop, dine, and do business. *Id.* Residential property owners and government-owned parcels will not specially benefit from this program and should not be assessed for it. *Id.*

The Administration and Management program accounts for 20 percent of the annual budget. Pet. ¶27. The Plan describes the categories of costs for this program but offers no cost breakdown. *Id.* The Plan does not show how administrative activities will advance the interests

of the BID property owners. *Id.*

The boundaries of the Venice BID were drawn without regard to establishing a cohesive BID that would provide meaningful value to the District. Pet. ¶29. As drawn, the boundaries disenfranchise property owners that oppose the BID. *Id.*

33 government-owned parcels comprise 28.29 percent of the total property ownership in the Venice BID. Pet. ¶30. Their automatic “yes” votes meant that the Venice BID only needed 22 percent to pass. *Id.* This also meant that over 25 percent of the assessments are paid for with government taxpayer money. Pet. ¶31. These government-owned properties derive no special benefits from the services proposed by the Venice BID as they are not commercial properties. Pet. ¶32. The City has abdicated its duty to its taxpayers by failing to evaluate whether the proposed Venice BID will actually confer any special benefits on the City-owned properties. Pet. ¶33.

According to Petitioners, the City violated the law by enacting an ordinance establishing the Venice BID because (1) it includes residential properties; (2) the services do not confer special benefits; (3) assuming there are special benefits, the amount assessed is not proportional to the benefits; and (4) the boundaries have been improperly gerrymandered disenfranchising property owners who oppose the BID. Pet. ¶35. The City also violated the law and abused its discretion by agreeing to pay assessments on City-owned properties as the Venice BID provides no special benefits to these properties and the assessments are a waste of taxpayer resources. Pet. ¶36.

2. Course of Proceedings

On February 27, 2018, the court ruled in accordance with its orally-modified tentative opinion, except as to the residential property issue. The matter was continued for supplemental briefing as to this issue only.

B. Standard of Review

A party may seek to set aside an agency decision by petitioning for either a writ of administrative mandamus (CCP §1094.5) or of traditional mandamus. CCP §1085. A petition for traditional mandamus is appropriate in all actions “to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station....” CCP §1085.

There are three general categories of agency decisions challenged by mandamus: (1) quasi-adjudicative decisions in which the agency exercised its discretion and which are challenged by administrative mandamus under CCP section 1094.5 for, (2) quasi-legislative decisions challenged by traditional mandamus under CCP section 1085, and (3) ministerial or informal administrative actions also challenged by traditional mandamus. See Western States Petroleum Assn. v. Superior Court, (“Western States”) (1995) 9 Cal.4th 571-76. An agency decision is quasi-adjudicative where it concerns the agency’s application of discretion in the determination of facts after a hearing is required. See Neighborhood Action Group v. County of Calaveras, (1984) 156 Cal.App.3d 1176, 1186. In contrast, quasi-legislative actions generally concern the adoption of a “broad, generally applicable rule of conduct on the basis of general public policy.” Saleeby v. State Bar, (1985) 39 Cal.3d 547.

The parties agree that the City’s action of adopting the Venice BID is a quasi-legislative act. A traditional writ of mandate is a method of challenging an agency’s quasi-legislative act.

The Sherwin-Williams Co. v. South Coast Air Quality Management District, (2001) 86 Cal.App.4th 1258, 1267. Courts exercise their independent judgment in reviewing whether assessments imposed by local agencies violate Prop 218. Silicon Valley Taxpayers Ass'n, Inc. v. Santa Clara County Open Space Authority, (“Silicon Valley”) (2008) 44 Cal.4th 431, 450.

Prop 218 was intended to make it more difficult for an assessment to be validated in a court proceeding. Silicon Valley, *supra*, 44 Cal.4th at 444. As a result, the local agency bears the burden of demonstrating that the special benefit satisfies Prop 218 because the assessed properties will receive a special benefit over and above the benefits conferred on the public at large and will only be assessed in an amount that is proportional to the special benefits those properties will enjoy. Cal. Const. art. XIII D (“art. XIID”), §4(e); Beutz v. County of Riverside, (“Beutz”) (2010) 184 Cal.App.4th 1516, 1529.

The parties disagree whether the City can meet its burden of proof by making a *prima facie* case, shifting the burden of producing evidence to Petitioners. *Compare* Opp. at 10 with Reply at 3-4. Petitioners are correct that the City always bears the burden of proof; it never shifts to Petitioners to prove that the special assessment is illegal. *See Beutz*, *supra*, 184 Cal.App.4th at 1529. This determination is made solely from the administrative record, which is required for Petitioners’ traditional mandamus challenge the quasi-legislative adoption of the Venice BID. Both parties are entitled to point to the administrative record, and whether the Engineer’s Report contains “solid, credible evidence”, for the court’s determination whether the City meets its burden of proof. No deference is owed to any of the evaluations in the Engineer’s Report supporting the special assessment. *See id.* at 1529. However, uncontradicted expert evidence that is solid and credible is sufficient for the City to meet its burden on any particular issue.

C. Governing Law

1. Prop 218

In 1978 the voters adopted Proposition 13 (“Prop 13”), adding article XIII A to the California Constitution. Prop 13, among other things, “impose[ed] important limitations upon the assessment and taxing powers of state and local governments.” Amador Valley Joint Union High School District v. State Board of Equalization, (1978) 22 Cal.2d 208, 218.

Prop 13 contained a loophole. Town of Tiburon v. Bondander, (“Tiburon”) (2009) 180 Cal.App.4th 1057, 1074. While local governments were restricted in imposing special taxes, they could still impose special assessments for local projects. *Id.* Prop 218, enacted by the voters in 1996 and adding Articles XIII C and D to the State Constitution, closed the loophole by clarifying in pertinent part that “only special benefits are assessable.” art. XIID §4(a). A “special benefit” is a particular and distinct benefit over and above general benefits conferred on real property located in the district or to the public at large. art. XIID §2(i). General enhancement of property value does not constitute a special benefit. *Id.*

Prop 218 imposed voter approval requirements for property-related fees, charges, and assessments. Howard Jarvis Taxpayers’ Assn. v. City of Los Angeles, (2000) 85 Cal.App.4th 79, 82-83. The Ballot Argument in support of Prop 218 stated that it was intended to guarantee Californians the “right to vote on local tax increases—even when they are called something else, like ‘assessments’ or fees’.” These restrictions were required because local politicians sought to exploit an apparent loophole in the law “that allow[ed] them to raise taxes without voter approval by calling taxes ‘assessments’ and ‘fees’.”

An agency which proposes to levy an assessment shall identify all parcels which will have a special benefit conferred upon them and upon which an assessment will be imposed. art. XIID §4(a). The proportionate special benefit derived by each identified parcel shall be determined in relationship to the cost of the property-related service being provided. *Id.* No assessment shall be imposed on any parcel which exceeds the reasonable cost of the proportional special benefit conferred on that parcel. *Id.* Only special benefits are assessable and agencies shall separate general benefits from special benefits conferred. *Id.* Parcels owned by the government are not exempt from assessment unless the government can demonstrate by clear and convincing evidence that those publicly owned parcels receive no special benefit. *Id.* “[T]he assessment must be in proportion to, and not greater than, the special benefit conferred on the property assessed. art. XIID §4(f). To satisfy the proportionality requirement, the local agency must establish that “the *aggregate* assessment imposed on *all* parcels is distributed *among* all assessed parcels *in proportion* to the special benefits on each parcel.” *Beutz, supra*, 184 Cal.App.4th at 1522 (emphasis in original).

Prop 218 contains procedural requirements designed to protect taxpayers from unwanted assessments. Prop 218 requires the local agency to mail ballots to each property owner informing the owner *inter alia* of the amount of, reason for, and basis of calculation of the assessment. art. XIID §4(c). If the weighted majority of property owners vote against the proposed assessment, the district may not be established. art. XIID §4(e). Additionally, the local agency must conduct a public hearing for the proposed assessment not less than 45 days after mailing the ballots. *Id.*

In any legal action contesting the validity of an assessment, the burden shall be on the agency to demonstrate that the property in question receives a special benefit over and above the general benefits conferred and that the amount of the assessment is proportional to, not greater than, the benefits conferred on the property in question. art. XIID §4(f).

2. BID Law

A BID is a defined area within a city created by petition of property owners under the Property and Business Improvement District Law of 1994 (“BID Law”) to self-fund and provide supplemental municipal services. Streets & Highway (“Sts. & Hy.”) Code §36600 *et seq.*

In enacting the BID Law, the Legislature expressly declared that it is in the public interest to promote the economic revitalization and physical maintenance of business districts in order to create jobs, attract new businesses, and prevent the erosion of business districts. Sts. & Hy. Code §36601(b). BIDs have also become an important tool helping communities to combat blight, promote economic opportunities, and create a clean and safe environment. Sts. & Hy. Code §36601(f). The activities that BIDs perform to benefit businesses or real property include promotion of public events; promotion of tourism; marketing and economic development; the providing of security sanitation, graffiti removal, street and sidewalk cleaning; and other municipal services supplemental to those normally provided by the municipality; and other services provided for the purpose of conferring special benefit upon assessed real property or businesses in the BID. Sts. & Hy. Code §36606.

To fund business related improvements, maintenance, and activities, BIDs are permitted to levy assessments upon businesses or real property that receive benefits from these improvements. Sts. & Hy. Code §36601(c). Assessments must be levied on real property and businesses on the basis of the estimated benefit to the real property or the business, respectively,

within the BID. Sts. & Hy. Code §36632(a), (b). Properties zoned solely for residential use are conclusively presumed not to benefit from the improvements and service funded through these assessments and shall not be subject to any assessment thereof. Sts. & Hy. Code §36632(c).

Assessments levied for the purpose of conferring special benefit upon the real property or upon businesses in a BID are not taxes for the general benefit of a city, even if others not assessed receive incidental or collateral effects that benefit them. Sts. & Hy. Code §§ 36601(d), 36601(h) (2014 amendments to BID Law intended to provide the Legislature's guidance for its interaction with art. XIID).¹ For purposes of BIDs, a "special benefit" means a particular and distinct benefit over and above general benefits conferred on real property located in a district or to the public at large. Sts. & Hy. Code §36615.5. Conversely, a "general benefit" is any benefit that is not a special benefit. Sts. & Hy. Code §36609.5.

Examples of the special benefits which BIDs can confer upon properties and business in their geographic boundaries include crime reduction, job creation, business attraction, business retention, economic growth, and new investments. Sts. & Hy. Code §36601(e). The mere fact that special benefits produce incidental or collateral effects that arise from the improvements, maintenance, or activities of BIDs, even if those incidental or collateral effects benefit property or persons not assessed, does not convert any portion of the special benefits into general benefits. Sts. & Hy. Code §§ 36615.5, 36601. Special benefits exclude general enhancement of property value. Id.

Assessments imposed on a parcel cannot exceed the reasonable cost of the proportional special benefit conferred on that parcel. Sts. & Hy. Code §36622(k)(2). Since only special benefits are assessable, a BID must separate the general benefits from the special benefits conferred on a parcel. Id. The value of incidental or collateral effects, however, will not be deducted. Id. Government-owned property is not exempt from assessments unless the governmental entity can demonstrate by clear and convincing evidence that the property in question receives no special benefit. Id.

A local agency may establish one or more separate benefit zones within the BID based upon the degree of benefit derived from the improvements or activities to be provided within the benefit zone and may impose a different assessment within each benefit zone. Sts. & Hy. Code §36628.

Procedurally, a group proposing to create a BID must submit a written petition signed by the property or business owners in the proposed BID who will pay more than 50 percent of the assessments proposed to be levied. Sts. & Hy. Code §36621(a). Following this submission, the city council may initiate proceedings to form a BID by the adoption of a resolution expressing its intent to form a district. Id. The resolution of intention must set a time and place for a hearing on the establishment of the BID. Sts. & Hy. Code §36621(c)(2). If written protests are received from owners of businesses in the proposed BID and these protesting owners will pay 50 percent or more of the assessments proposed to be levied, no further proceedings to levy the assessment may be taken. Sts. & Hy. Code §36623(b). Following the public hearing, if the local agency still desires to establish the proposed BID, it shall adopt a resolution establishing the BID. Sts. & Hy. Code §36626.

¹ There is a strong presumption in favor of the Legislature's interpretation of a constitutional provision in legislation intended to clarify and implement the constitutional provision. Green v. Future Two, (1986) 179 Cal.App.3d 738, 742-43.

D. Statement of Facts²

a. Venice BID Characteristics

On June 24, 2016, the Office of the City Clerk issued a Preliminary Report with respect to the formation of the Venice BID. AR 788-895. The report attached the Management District Plan ("Plan"), an Engineer's Report, and a draft Ordinance of Intention. AR 788. The Plan states that the BID shall have a five-year life beginning January 1, 2017 and ending December 31, 2021. AR 797. The Plan states that the BID is expected to begin services on or shortly after January 1, 2017. *Id.*

The Venice BID lies entirely within Venice, a coastal community within the City. AR 797. The Venice BID's boundaries include the Venice Beach ocean front boardwalk, which is a mixed-use, pedestrian-oriented, and tourist-dominated commercial corridor. AR 849. The District includes all non-residentially-zoned properties between the City boundary with Santa Monica to the north, the Pacific Ocean to the west, and Venice Boulevard to the south. *Id.* The District's eastern boundary is irregular and is primarily placed where industrially-zoned properties end and residentially-zoned properties begin. *Id.*

The Venice BID covers 464 parcels owned by 349 stakeholders. AR 612. 33 of these 464 parcels are government-owned. AR 825. Of these 33 parcels, 24 are owned by the City, seven by the state of California, one by the Los Angeles Unified School District, and one by the Metropolitan Transit Authority. *Id.* The Venice BID does not include any parcels zoned solely for residential use.

Venice Beach is the #2 tourist destination in Southern California (after Disneyland). AR 802. The property uses within District boundaries are a mix of commercial, industrial, government, and residential. AR 802. The commercial parcels are heavily tourist-related -- *e.g.*, hotels, vacation rentals, restaurants, entertainment, paid parking, visitor services, and retail uses. AR 803. The commercial parcels are principally occupied by commercial businesses, office space, guest/vacation rental units, and/or mixed use condominium units over retail (many of which are operated as vacation rental units). *Id.* In these industrial areas, many parcels contain multiple uses within a single parcel, such as residential over retail. *Id.* One of the District goals is to maintain and increase this tourist base. *Id.* The industrial parcels are principally occupied by commercial businesses, office space, guest/vacation rental units, and mixed-use condominium

² Petitioners ask the court to judicially notice the Ballot Pamphlet for the November 5, 1996 General Election. The request is granted. Evid. Code §452(c). Respondents ask the court to judicially notice City Charter section 350. The request is granted. Evid. Code §452(b).

Respondents object to Petitioner's supporting declarations as extra-record evidence inadmissible for a quasi-legislative administrative decisions under Western States Petroleum Assn. v. Superior Court, ("Western States") (1995) 9 Cal.4th 559, 574. Petitioner contends that the declarations met the test of CCP section 1094.5 because the evidence could not have been presented at the hearing. Reply at 9. Petitioners wrongly rely on CCP section 1094.5. This is a traditional mandamus case concerning a quasi-legislative decision, not administrative mandamus. No extra-record evidence may be received unless it involves standing, capacity to sue, or affirmative defense issues. Western States, *supra*, 9 Cal.4th at 578, n.5. The evidence is inadmissible extra-record evidence for the challenge to adoption of the Venice BID and the objections are sustained.

units over retail. *Id.* Notwithstanding that some parcels are in residential use, none of the parcels are residentially-zoned. AR 875.

Under the Plan, the Venice BID will impose \$10,338,113 in special assessments over a five-year period: \$1,871,119 in 2017, \$1,964,674 in 2018, \$2,062,908 in 2019, \$2,166,054 in 2020, and \$2,273,358 in 2021. AR 798-801.

b. Special Benefit Categories

The Plan identifies three BID special benefit categories: (1) the Clean & Safe Programs; (2) District Identity & Special Projects; and (3) Administration & Management. AR 797-98.

The Clean & Safe Programs account for 73 percent of the total budget. AR 797. The Clean Program involves activities such as sweeping, litter removal, steam cleaning, and graffiti removal. AR 816. The Safe Program encompasses all patrol/ambassadorial services in the District and includes personnel on foot, bike or other vehicles, ambassadors to provide directions and business information, emergency assistance, and crime prevention activities. AR 817.

The goal of the Clean & Safe Programs is to establish and maintain a clean, safe, beautiful, and welcoming District. AR 817. The Clean Programs are designed to increase vehicular and pedestrian traffic and increase commerce and customer activity by improving the aesthetic appeal. AR 818. The Safe Programs will assist in creating a safer and more secure environment for each individual assessed parcel in the District. *Id.* For those properties zoned commercial but in residential use, the Clean & Safe Programs are designed to improve the security of such properties for the benefit of tenants, visitors, and landlords and, in turn, increase residential occupancies and return on investment. *Id.*

The District Identity category accounts for 7 percent of the total budget. AR 819. The activities include production of a quarterly newsletter distributed to all property owners in the District, efforts to cultivate the satisfaction and retention of businesses and visitors, advertising, response to media inquiries, and promotion of the Venice BID through a website and social media engagement. *Id.* The budget breakdown among these various activities is not provided. *See id.* With the exception of parking lots and other commercial operations, government-owned parcels will not specially benefit from this element and will not be assessed for these programs. *Id.*

The Administration & Management category accounts for 20 percent of the total budget. AR 818. This category includes activities such as personnel, operations, and professional services like legal and accounting. *Id.* The Plan does not provide a cost breakdown of these various component costs. *See id.*

c. Assessment Methodology

The Plan calculates each parcel's assessment based on three criteria: building square footage, lot square footage, and frontage linear footage. AR 821. These criteria were used because they offer a proven method of fairly and equitably spreading special benefit costs to beneficiaries of BID funded services, programs, and improvements. AR 875. The Plan establishes two assessment zones. Zone 1 is situated on the Venice boardwalk (largely occupied by retail and restaurant businesses) and Zone 2 is located on the eastern portion of the District where "tourism plays a much smaller role" in the need for safe and clean services. AR 817, 812-15. The rate for linear square footage in Zone 1 is double the rate in Zone 2. AR 821. The rationale for this difference is that Zone 1 will receive twice the frequency of clean and safe

services as Zone 2 because tourism is far greater in that zone. AR 817, 821.

Each assessed parcel within the Venice BID will proportionately specially benefit from the BID funded programs. AR 858. Because of its extensive ownership interest in the District, the government will pay 28.29 percent of the total special assessments levied by the BID. AR 828.

d. Engineer's Report

The Engineer's Report states in pertinent part as follows. The benefits from the Venice BID's programs are special and unique to the identified parcels within the District because these programs and services will be provided directly for their benefit. AR 848.

A "general benefit" is "[a] benefit to properties in the area and in the surrounding community or benefit to the public in general resulting from the improvement, activity, or service to be provided by the assessment levied." AR 858. The California Constitution defines a "special benefit" as a distinct benefit over and above general benefits conferred on real property located in the District or to the public at large. AR 858-59.

The assessed commercial/industrial parcels are conferred proportionate special benefits from the District's services because these services are intended to attract more customers, users, visitors, employees, tenants, and investors. AR 859. The programs are designed to improve commerce, security and aesthetic appeal for patrons, visitors, and employees of these parcels by reducing crime, litter and debris and professionally marketing the goods and services available in the Venice BID. Id. The programs are designed to increase business volumes, sales transactions, commercial occupancies, commercial rental income, and return on investments. Id.

Government-owned parcels -- with the exception of parking lots, vendors, shops, kiosks, pay to play recreational facilities and other commercial uses -- specially benefit in a different manner than commercial parcels as they are not attempting to attract customers or generate profits or commerce. AR 859, 877. These parcels specially benefit because they will possess cleaner and safer facilities for their employees, students, visitors, vendors, and other users of these public locations and facilities. Id. Government-owned parcels will not benefit from District Identity Programs and will not be assessed for them. AR 859.

Residential parcels within the District will specially benefit from the Clean & Safe and District Identity Programs designed to improve the cleanliness, security, marketability, and livability of these parcels. AR 860. The majority of residential units within the Venice BID -- whether they are single family homes, apartments, or residential condominiums -- are used as business enterprises, live/work units, rental units, or vacation rental units. AR 860. Each residential unit should be treated as an existing or potential for-profit business enterprise, live/work unit, rental unit, or vacation rental unit. Id. As such, the proportionate special benefits conferred on all residential parcels and units shall be considered similar to those conferred on commercial/industrial parcels within the District. Id.

While the Venice BID is designed to provide special benefits to assessed parcels, there may also be an incidental general benefit to the public at large. AR 861. Generally, over 95% of the people moving within Venice BID boundaries are engaged in business related to the assessed parcels, and the percentage of the public "just passing through" is only 5%. AR 861. Based on the focused nature of the program and the Engineer's "over 30 years of assessment engineering experience", a general benefit factor of 0.01 (1%) should be attributed to the public at large, and the dollar value of this percentage is \$9,871. AR 862.

While the Venice BID programs will not be provided directly to parcels outside District boundaries, they may receive indirect general benefits from the programs. There are 25 parcels with commercial uses across the street or alleys from the District but within City boundaries and three parcels adjacent to the District that are outside City limits. AR 862. The Engineer Report attributes a benefit factor of 1.0 to the 461 parcels assessed within the District, a benefit factor of .10 to the three commercial parcels adjacent to the District, and a benefit factor of .05 to the general benefits conferred on the 25 commercial properties across the street from Venice BID parcels. AR 862. The dollar value of general benefits for parcels outside the District is \$6,187. AR 862.

The properties will not be assessed for general benefits. The total value of general benefits conferred on the public at large and parcels outside the District amounts to \$16,058 (\$9,871 + \$6,187) or .86%, which the Report rounds up to 1% or \$18,711. AR 862-63. Consequently, 99 percent of the total costs would be for special benefits. AR 862-63. For the 2017 program cost of \$1,871,119, this means that the value of general benefits would be \$18,711 and the value of special benefits would be \$1,852,408. AR 863.

The assessment rates for each parcel in the BID are directly related to the level of service and, therefore, special benefits conferred on each parcel. AR 870.

e. Establishment of the Venice BID

Relying on the Plan and Engineer's Report, the proponents of the Venice BID submitted petitions to the City Clerk signed by property owners who will pay more than 50 percent of the assessment proposed to be levied. AR 612, 789. The petitions received by the City Clerk indicated affirmative financial support of the project in an equivalent amount of \$968,902.69, which comprises 52.31 percent of the District's projected first year revenue of \$1,871,119. *Id.* 26.21% of the 52.31 percent majority (more than over half) came from government-owned properties. AR 1009-15.

On June 29, 2016, the City Council adopted an Ordinance of Intention declaring its intention to establish the Venice BID and levy assessments pursuant to the Clerk's recommendation. AR 2, 501, 711, 793. A public hearing regarding the Venice BID was held on August 23, 2016. AR 501. Because not all members of the public who requested to provide testimony were allowed to do so, the City Attorney recommended that the Ordinance of Intention be repealed and a new ordinance enacted and the hearing be repeated. AR 502. On September 20, 2016, the City Council adopted another Ordinance of Intention. AR 5.

A hearing on the proposed ordinance was held on November 8, 2016. AR 1, 5. Several objections were raised about the creation of the Venice BID and, in turn, imposition of assessments on residential property owners. AR 332-33 (Venice Community Housing stating that residential property owners will not benefit from the District's marketing or property increases), 335-36 (Venice Community Housing stating that Venice is a residential area with a strip of commercial residents and will be the most impacted), 341 (Venice Beach homeowner stating that assessments are unfair); 353 (retired residential owner stating that only four other residences are on his block); 354 (property owner stating that ten homes are in his area that have not been used for commercial purposes in the 60 years they have existed); 361 (studio resident who had no need for any BID services); 362 (same); 365 (resident of commercial and residential building); 366-67 (owner of five-unit apartment building); 547 (written opposition); 759-60 (former resident arguing that Venice "is a residential area").

At the conclusion of the meeting, a City councilmember stated that he would be happy to help rezone properties from commercial to residential for those who were using commercially-zoned properties as residences. AR 377-78.

On November 9, 2016, the property owners' weighted votes were tabulated: 89 votes with a weighted value of \$1,052,547.80 representing 75.35 percent of the total ballot were in favor of establishment of the Venice BID, and 99 votes with a weighted value of \$344,371.22 representing 24.65 percent of the total ballot were against its establishment. AR 1, 9. An ordinance was thereafter duly enacted, which adopted the Venice BID, the Plan, and the Engineer's Report. AR 5-8.

E. Analysis

Petitioners seek a writ of mandate challenging the Venice BID's formation, arguing that (1) the Venice BID has provided no benefits of any kind in the first year that the special assessment was collected, (2) the Venice BID assessment does not provide any special benefits to property owners, (3) the Engineer's Report lacks credible evidence that the general benefits of the assessment amount to only one percent of the total benefits conferred, (4) residential property owners do not receive a proportional benefit in violation of art. XIID, and (5) the Venice BID's boundaries were improperly gerrymandered.³

Petitioners seek mandamus compelling the City to set aside the Venice BID ordinance, dissolve the Venice BID, redraw the Venice BID's boundaries, and refund the assessments paid. Petitioners also seek declaratory relief stating that the proposed Venice BID violates the law.

1. The Venice BID's First Year of Operation

Petitioners argue that the Venice BID has provided no benefits of any kind in its first year of operation. The Plan represented that services would begin "on or shortly after January 1, 2017." AR 797. The ordinance establishing the District provides that the operational period will begin on January 1, 2017 and end on December 31, 2012. AR 7. The City collected the special assessments from District property owners in March and April 2017. *See* AR 798-801. Yet, the City provided no services in 2017. When the government collects taxes and then fails to use them for the public good, it violates the public trust. *See Otis v. City of Los Angeles*, (1937) 9 Cal.2d 366, 376. Pet. Op. Br. at 11-12.

Even if the City intends to roll over the 2017 revenue and spend it in subsequent years with greater intensity, the City cannot conduct this kind of bait and switch. The Plan said that the Venice BID would provide services for five years; it may not now say that it will provide four years of services at a greater frequency or intensity. Art. XIID section 4 sets forth the procedure for notifying property owners of the amount of assessment and how it will be used, and art. XIID section 6(b) prohibits changes in the assessment scheme without property notice to property owners. Because the Venice BID failed to provide 2017 services, it should be dissolved and the assessments returned to property owners. Pet. Op. Br. at 12-13.

The problem with Petitioners' argument, as Respondents contend, is that it is not within the scope of the Petition. The Petition sets forth two causes of action, mandamus and declaratory relief, challenging the Venice BID formation. The Petition's Prayer seeks only a mandamus writ

³ Petitioners do not argue that the City failed to follow the procedure required by the BID Law in enacting the Venice BID.

to (a) set aside the Venice BID, (b) contest the assessment of City-owned properties, and (c) compel the City to redraw the District's boundaries, as well as a declaration that formation of the District violated the law. Nowhere does the Petition challenge the 2017 operation of the Venice BID.

Respondents argue that (1) any challenge to the Venice BID is untimely as not made within the 30-day statute of limitations, (2) Petitioners cannot get a refund of the 2017 assessment without submitting a government claim under City Charter section 350 (Resp. RJN, Ex. A), and (3) a different administrative record is required for any challenge to the Venice BID's operation. Opp. at 13. The court does not agree with the bulk of these arguments. No statute of limitations concerning BID formation applies to a challenge to the District's operation. Petitioners need not file a government claim if they are not seeking a refund or damages, as opposed to injunctive relief. And no administrative record is required for a challenge to the Venice BID's operation, which would be a traditional mandamus based on a mandatory duty or a taxpayer claim.

But the court does agree that no such challenge is within the scope of the Petition. As Respondents argue: "The [Venice] BID satisfies Article XIID's formation requirements regardless of how the [Venice] BID executes its obligations under its master plan during its first year of implementation." Opp. at 14. For this reason, Respondents' objections to Petitioners' declarations and documentary evidence was sustained.

In reply, Petitioners contend that the court may admit extra-record evidence when it exercises its independent judgment, applying the test of CCP section 1094.5(e). Two points must be made. First, Petitioners' extra-record evidence is irrelevant to the scope of their Petition, which simply does not include post-formation issues. Second, this case lies in traditional mandamus (CCP §1085), not administrative mandamus (CCP §1094.5). As discussed *ante*, extra-record evidence is admissible in a challenge to a quasi-legislative decision only for issues of standing, capacity to sue, or affirmative defense issues. Western States, *supra*, 9 Cal.4th at 578, n. 5.

Petitioners' argument concerning to the Venice BID's first year of operation is outside the scope of this lawsuit.

2. Special Benefits to the Property Owners

a. Petitioners' Argument

Petitioners argue that the Venice BID confers no special benefits to property owners and that all benefits are general in nature and not subject to assessment. Typical special benefits are public works that directly benefit the specific properties assessed. The California Supreme Court has given examples of a direct benefit to property: "a street improvement, lighting improvement, irrigation improvement, sewer connection, drainage improvement, or flood control improvement. San Marcos Water District v. San Marcos Unified School District, (1986) 42 Cal.3d 154, 162, *superseded by statute as recognized in* City of San Marcos v. Board of Trustees of the California State University, (2006) 39 Cal.4th 341, 353. Pet. Op. Br. at 14.

The Safe Program aims to enhance the safety of the Venice Beach community. Pet. Op. Br. at 13. While a laudable goal, safety is quintessentially a general benefit. Safety cannot be quantifiably tied to a particular property, and the proportionate benefit to any particular property cannot be calculated as Prop 218 requires for a special benefit. Pet. Op. Br. at 14. The legislative analysis of Prop 218 provides examples of general benefits: "fire, park, ambulance,

and mosquito control....” Pet. RJN Ex. A, p. 73. The Venice BID’s safety patrols -- like an ambulance service, fire department, or police force – provide an inherently general benefit to the community at large, and do not meet Prop 218’s requirement of a “particular and distinct benefit over and above general benefits conferred...on the public at large”. Pet. Op. Br. at 14. Similarly, the Clean Program’s goals of street beautification, graffiti removal, and aesthetic goals inure to the public’s general benefit. The Clean Program may indirectly increase property values by making the District more appealing, but Prop 218 expressly provides that enhanced property value does not qualify as a special benefit. art. XIID §2(i).

According to Petitioners, the Engineer’s Report does not establish that property owners will derive any greater benefit from the Clean and Safety Programs than non-property owning residents in, or visitors to, the District. The Engineer’s Report professes that special benefits will be provided directly for the benefit of identified parcels, but the security patrols will provide safety services to everyone -- property owners, renters, and visitors alike. Pet. Op. Br. at 15-16. The Engineer’s Report also asserts that property owners will realize special benefits from a safe and clean neighborhood, resulting in increasing commercial activity and an “increased return on investment.” AR 859. Petitioners contend that this makes safety and cleanliness a direct benefit and enhanced property value an indirect benefit. Prop 218, however, precludes enhanced property value as a special benefit. art. XIID §2(i). Pet. Op. Br. at 16.

b. Dahms

In Dahms v. Downtown Pomona Property, (“Dahms”) (2009) 174 Cal.App.4th 708, the city of Pomona adopted a BID for its downtown area to provide security, street cleaning and maintenance, and marketing, all of which were provided only to the properties within the BID and which exceeded the services already provided by the city. Id. at 713. The engineer’s report based the assessment on the property owners’ street frontage, building size, and lot size. Ibid. The engineer’s report stated that nonprofit entities within the district would be assessed at a lesser amount (5%) than they would otherwise have to pay and exempted from assessment properties zoned exclusively for residential. Ibid. The court initially held that (1) nothing in art. XIID prohibits a discount for nonprofits where the assessment of other properties exceeds the benefits accorded to them (id. at 716), (2) Dahms had not shown through articulate and supported argument that the city failed to assess certain commercial parcels or otherwise gave them an unlawful discount, and (3) street frontage is a proper factor to include in the special benefits analysis. Id. at 720.

The Dahms court then turned to the distinction in the engineer’s report between special and general benefits. The court noted that art. XIID requires that assessments be limited to the reasonable cost of providing special benefits, and the cost of general benefits may not be included. Id. at 722. The city complied with that Prop 218 requirement because the BID’s security, street maintenance, and marketing services over and above those already provided by the city were limited to the BID boundaries and provided only to the BID properties, not the public at large. Ibid. These services therefore were special benefits. Ibid.

Dahms appeared to argue that if the BID confers special benefits on property owners, but these special benefits produced general benefits (either for the BID or the broader community), then the value of the general benefits must be deducted from the assessment. Id. at 723. This argument was erroneous because art. XIID section 4(a) only requires that the assessment may not exceed the reasonable cost of special benefits. Ibid. The security, street maintenance, and

marketing services provided by the BID are all special benefits conferred on BID properties in a way that is particular and distinct from their effect on other parcels and the public at large. *Ibid.* The assessment for each parcel is the reasonable cost of the proportional special benefit conferred on each parcel. If the special benefits themselves confer general benefits, the value of those general benefits need not be deducted from the assessment. *Ibid.*

The *Dahms* court distinguished the Pomona BID services, which are provided directly to the assessed parcels, from the district invalidated by the California Supreme Court in *Silicon Valley Taxpayers' Assn. v. Santa Clara County Open Space Authority*, ("*SVTA*") (2008) 44 Cal.4th 431, 454. In *SVTA*, an 800 square mile district with approximately 314,000 parcels was assessed funding to maintain open spaces in the district for recreation, conservation, watersheds, and easements. *Id.* at 724 (citation omitted). The engineer's report listed seven general putative special benefits which the Supreme Court concluded were all general benefits and not based on the proportionate cost of benefit to each assessed property. *Ibid.* (citation omitted). The *Dahms* court concluded that, unlike the district in *SVTA* where the putative special benefits were merely the effects of the services provided, Pomona's BID services were themselves special benefits for the assessed parcels. *Id.* at 725.

c. Dahms Is Controlling Authority

Petitioners' argument is foreclosed by *Dahms*, which expressly upheld a BID's safety and cleanup services as special benefits. Petitioners' contention -- that safety is quintessentially a general benefit and street maintenance and other aesthetic goals inure to the public's general benefit -- misunderstands the Venice BID's purpose, which is to provide to the assessed parcels within the District safety and cleanup services above and beyond those already provided by the City. These services are not intended for the general public; they are intended for the assessed parcels.

Dahms explains that the fact that services provided to the assessed properties will have an ancillary benefit to the general public does not affect the special benefit analysis. The assessment for each parcel is the reasonable cost of the proportional special benefit conferred on that parcel. If the special benefits themselves confer general benefits on others, the value of those general benefits need not be deducted from the assessment. 174 Cal.App.4th at 723.

Respondents point out that in 2014 the Legislature ratified *Dahms* by clarifying for the BID Law that special benefits may confer incidental or collateral effects on property or persons not assessed, and those special benefits may include security and maintenance services funded through a BID assessment. Opp. at 11-12, 14. The 2014 amendments were intended to provide the Legislature's guidance on the interaction between art. XIID and the determination of special benefits in property-based districts. Sts. & Hy Code §36601(h). There is a strong presumption in favor of the Legislature's interpretation of art. XIID. *Green v. Future Two*, *supra*, 179 Cal.App.3d at 742-43.

Pursuant to the 2014 amendments, a special benefit "includes incidental or collateral effects that arise from the improvements, maintenance, or activities of property-based districts even if those incidental or collateral effects benefit property or persons not assessed." Sts. & Hy Code §36615.5. "...The mere fact that special benefits produce incidental or collateral effects that benefit property or persons not assessed does not convert any portion of those special benefits or their incidental or collateral effects into general benefits." Sts. & Hy Code §36601(h)(2). The "activities" that may be assessed in a property-based district include services

that will provide for the "security, sanitation, graffiti removal, street and sidewalk cleaning, and other municipal services supplemental to those normally provided by the municipality." Sts. & Hy Code §36606(e).

Thus, as Respondents argue, that fact that safety and cleaning services provided to the assessed properties may also provide incidental value to the public at large is irrelevant. The services are provided directly to the assessed properties in the District. For example, the properties themselves and the buildings, signage, streets, and sidewalks around them will be cleaned of graffiti, litter, dirt, and debris. The security patrols will be provided security to prevent and stop crime within the District. Presumably, the only crimes the security patrols will be interested are those that affect the Venice BID's commerce – assaults, drug sales, prostitution, etc., -- and not white collar or other matters not constituting "street crime". The same is true of security issues not amounting to existing crime: vagrancy and homelessness. That the public may also benefit from these special benefits is irrelevant.

The Engineer's Report explains: "[T]he benefits are special and unique only to the identified parcels within the District because programs and services... will only be provided directly for the benefit of the identified parcels." AR 848. For the commercial and industrial parcels and government-owned parcels with commercial uses, the Clean and Safe Programs will improve commerce, security and aesthetic appeal for patrons, visitors and employees. For the government-owned parcels, the clean and safe programs will provide cleaner entrances and perimeters for employees, visitors, vendors, and users of the public facilities. AR 859-60. The programs will also attract and retain new business and patrons for the assessed commercial and industrial parcels. AR 859. For the commercial or industrial zoned properties with residential uses, the Engineer's Report highlights how the Clean and Safe Programs will improve the appeal of each assessed parcel for tenants, visitors, and landlords by reducing crime and debris and increasing the safety and attractiveness of residential rental units within the BID and the array of tourist-related goods and services in the District. AR 859-60.

Petitioners' attempt to distinguish Dahms as a case which did not consider the threshold question of "whether and to what extent the services provided special benefits" is simply wrong. See Pet. Op. Br. at 17, n.6. Dahms expressly found that the special benefits were conferred on the property owners, unlike the open space in SVTA.

Petitioners rely on Golden Hill Neighborhood Assn. v. City of San Diego, ("Golden Hill") (2011) 199 Cal.App.4th 1574, 425, 439, and Beutz, *supra*, 184 Cal.App.4th at 1519. Pet. Op. Br. at 15.

In Beutz, the court addressed a special assessment district consisting of residential properties to pay the cost of maintaining three closed public parks and one new park in the district. 184 Cal.App.4th at 1519, 1525. The engineer's report listed the special benefits that would be conferred on the residential properties, but admitted that the landscaping would confer benefits on the general public. *Id.* at 1527. In relevant part, the court noted that art. XIID section 4(a) required separation of the general and special benefits of a public improvement project and estimating the quantity of each to limit the assessment solely to the special benefits conferred on an assessed property. *Id.* at 1532. The court held that the engineer's report did not separate and quantify the general and special benefits to be realized from the master plan. *Id.* at 1523-24. The report was missing a quantification of the general public's benefit in relation to a quantification of the residential property owners' benefit. *Id.* at 1523. In addition, the report was missing an analysis of how and why the residential properties would specially benefit from their

own anticipated use of the parks. This was important because it was by no means clear that residents would use the parks more intensively than persons from other communities. *Ibid.* The engineer's report wrongly appeared to be based on an assessment on the cost of maintaining the parks rather than on the cost of the special benefits conferred on the assessed parcels. *Id.* at 1535 (citing *Tiburón*, *supra*, 180 Cal.App.4th at 1063). Thus, the engineer's report was defective because it failed to show that (a) the parks would confer special benefits on the residential properties, and (b) the amount of assessment on each residential parcel was proportional to the special benefits conferred on that parcel. *Id.* at 1533-34.

In *Golden Hill*, the court considered a maintenance assessment district intended to provide funding for debris and litter removal, landscaping, sprinklers, sidewalks, street lighting, and signage for a particular area in San Diego. 199 Cal.App.4th at 424-25. The engineer's report divided the district into two zones and assessed each parcel by square footage. *Id.* After holding that the vote for the maintenance district was flawed by the weight accorded to the city's own park and open space parcels (*id.* at 433-34), the court addressed the issue of separating general and special benefits. *Id.* at 436-40. The court agreed with *Beutz* that the general and special benefits conferred on real property must be separated and quantified, which generally is accomplished by apportioning the cost of service between the two and assessing property owners only for the cost representing special benefits. *Id.* at 438. The engineer's report statement that properties outside the district do not receive the benefit of services funded by the district did not show that the general public, whether inside or outside the district, would not receive some benefit from the services. *Id.* at 439. A number of the services – trail beautification, homelessness patrols, website information, and special events – showed obvious benefit to the general public. *Ibid.* The engineer's report admitted that at least minimal general benefits were provided by the services, and the court held that even minimal benefits must be offset under art. XIID. *Ibid.*

Beutz and *Golden Hill* do not aid Petitioners. Both cases stand for the proposition that a special district must provide services that confer special benefits on the assessed properties and that services provided to the general public must be separated from the special benefits and quantified. Services for park maintenance do not necessarily benefit assessed property owners more than the surrounding communities (*Beutz*) and the special benefit of services for a residential district that included trail beautification, homelessness patrols, and website information must be separated from a general benefit to the general public inside and outside the district (*Golden Hill*). Unlike *Beutz*, the Venice BID's services of security and cleaning are provided to the assessed parcels. Unlike *Golden Hill*, the special services are provided to the assessed property owners and not to the public at large.

The City has met its burden to show the Venice BID's Clean and Safety Programs will provide special benefits to the assessed parcels.

3. The Engineer Report's Apportionment of General and Special Benefits

Petitioners note that the lynchpin of Prop 218 is that only special benefits are assessable. Reply at 2. Petitioners attack the Engineer Report's (sometimes "Report") calculation of a 1% general benefit for the public at large and outside District property owners. While the Report purports to separate general and special benefits as required by Prop 218, it does not do so credibly. See *Beutz*, *supra*, 184 Cal.App.4th at 1533 (invalidating assessment district because engineer's report was not solid, credible evidence regarding separation of general and special

benefits).

Petitioners note that the Engineer's Report states that generally over 95% of people moving in the District are engaged in business and only 5% of the public at large is "just passing through". AR 861-62. Petitioners argue that this statement -- that only 5% are not property owners -- cannot be squared with the Venice BID's statement that BID services are desirable because Venice is the #2 Southern California tourist base. If tourists and customers are meant to be excluded from the 5% just passing through, then these same tourists and customers directly benefit from the safety services paid for by the property owners. Given these numbers, it is hard to see how property owners benefit more than non-property owners by a factor of 100 to 1. Pet. Op. Br. at 17. Petitioners reiterate that the Venice BID was formed in large part to provide extra security to the large number of Venice visitors. AR 803. If that is true, how can the Engineer's Report conclude that the District benefits property owners over tenants, tourists, and visitors by a factor of 99 to 1? Reply at 3.

Petitioners misunderstand the direct benefit to property owners. Both sides agree that whether a benefit is special or general depends on who receives the service, not the nature of service provided. Opp. at 6; Reply at 5. Consistent with Venice Beach's status as a tourist destination, the Engineer's Report concludes that 95% of persons within the District's boundaries are there for commerce reasons. The Clean and Safe Programs will be provided directly to and solely for the benefit of the assessed properties. AR 848. The property owners receive a special benefit of safety and cleaning services intended to generate commerce from the very 95% of persons who are present in the District for commerce reasons. Thus, the fact that 95% of persons present in the District are there for commerce reasons is part of the direct special benefit to the assessed parcels, which is intended to result in increased commerce from these very persons. Only the 5% of persons just passing through the District who have no bearing on commerce and are not part of the special benefit provided to property owners. The mere fact that the special benefits may have collateral or incidental effects to the 95% of visitors and tourists providing commerce to the District does not undermine the fact that special benefits are provided to assessed parcel owners. See Sts. & Hy Code §§ 36601(h)(2), 36615.5.

The District provides security and cleaning services directly to all assessed parcels, and does so through three parcel-specific factors (street frontage, building size, and lot size) to calculate each parcel's assessment. The special benefits conferred by the Venice BID's programs are not merely the *effects* of services funded by the assessments; rather, the services are special benefits *provided to* all of the assessed parcels. Dahms, supra, 174 Cal.App.4th at 722. Per art. XIID, the assessed properties will receive a special benefit equal to 100% of the cost of such services, which is 99% of the Venice BID program cost. The remaining 1% of program cost is attributed to the general benefit provided to the general public "just passing through" and to parcels outside the District. Petitioners provide no evidence that the Engineer's Report erred in its numerical calculation of the general benefit attributable to the general public just passing through and not acting in commerce, and to the property owners outside the District. See Opp. at 19.

The Engineer's Report credibly apportions only a small amount of program cost to general benefit to the public at large and to property owners outside the District.

4. Residential Property Owners

Petitioners argue that residential property owners do not receive a proportional benefit.

Properties “zoned solely for residential use...are conclusively presumed not to benefit from the improvements” provided by BIDs. Sts. & Hy Code §36501. The Plan clearly states that the Venice BID’s goal is to promote commercial activity. This makes sense for retail businesses but not for governmental or residential properties. The Plan concedes as much for government-owned, non-commercial properties. The same logic should be applied to residential properties, whatever their zoning designation. The Engineer’s Report admits that some assessed properties are used exclusively for residential purposes. AR 860. These residential properties, like government-owned, non-commercial properties, receive no benefit from the Venice BID’s programs. Yet, residential property owners are assessed for these commercial activities, which is not permitted by Prop 218. art. XIID, §4. Pet. Op. Br. at 18-19.

The court tends to agree. The Engineer’s Report stated that the majority of residential units within the Venice BID -- whether they are single family homes, apartments, or residential condominiums -- are used as business enterprises, live/work units, rental units, or vacation rental units. AR 860. These properties will specially benefit from the Clean & Safe and District Identity Programs designed to improve the cleanliness, security, marketability, and livability of these parcels. AR 860.

However, the Report acknowledged that there are properties used solely for residential purposes in these areas zoned for commercial use. *Id.* A number of residents expressly objected to formation of the Venice BID on the ground that they were residents and not businesses. AR 332-33 (Venice Community Housing stating that residential property owners will not benefit from the District’s marketing or property increases), 335-36 (Venice Community Housing stating that Venice is a residential area with a strip of commercial residents will be the most impacted), 341 (Venice Beach homeowner stating that assessments are unfair); 353 (retired residential owner stating that only four other residences are on his block); 354 (property owner stating that ten homes are in his area that have not been used for commercial purposes in the 60 years they have existed); 361 (studio resident who had no need for any BID services); 362 (same); 365 (resident of commercial and residential building); 366-67 (owner of five-unit apartment building); 547 (written opposition); 759-60 (former resident arguing that Venice “is a residential area”).⁴

The Engineer’s Report treated the issue of residential use in commercially-zoned areas as a *potential* for-profit business enterprise, live/work unit, rental unit, or vacation rental unit. AR 860. As such, proportionate special benefits were considered to be conferred on all residential parcels and units. *Id.* This is inconsistent with art. XIID, the BID Law, and the purpose of the Venice BID.

Under art. XIID, an agency which proposes to levy an assessment shall identify all parcels which will have a special benefit conferred upon them and upon which an assessment will be imposed. art. XIID §4(a). The proportionate special benefit derived by each identified parcel shall be determined in relationship to the cost of the property-related service being provided. *Id.* No assessment shall be imposed on any parcel which exceeds the reasonable cost of the proportional special benefit conferred on that parcel. *Id.* Art. XIID makes plain that a parcel may be assessed only if that the parcel necessarily will have a special benefit conferred on

⁴ The City’s only response was for a City councilmember to state that he would be happy to help rezone properties from commercial to residential for those who were using commercially-zoned properties as residences. AR 377-78.

it. The *potential* for a special benefit simply is not good enough.

Under the BID Law, districts are created to promote the economic revitalization and physical maintenance of business districts in order to create jobs, attract new businesses, and prevent the erosion of business districts. Sts. & Hy. Code §36601(b). Properties zoned solely for residential use are conclusively presumed not to benefit from the improvements and service funded through these assessments and shall not be subject to any assessment thereof. Sts. & Hy. Code §36632(c). There is no reason to assess for BID programs a residential property that is used solely as a residence simply because it is within a commercial zone and could *potentially* be used for commerce.

The Engineer's Report states that the Venice BID is designed to "increase vehicular and pedestrian traffic within the District to increase commerce and customer activity" and to "increase residential occupancies and return on investment." AR 817-19. The assessment will exclude government-owned properties from the District Identity Programs because they derive no benefit from the program element's effort to increase commerce. AR 819. By this same logic, residential uses should not have to pay for the District Identity Programs either. *See Reply* at 8.

Thus, Prop 218 requires that any assessment necessarily will have a special benefit conferred on a parcel; a potential benefit is not good enough. The BID Law generally and the Venice BID specifically are designed to provide programs that increase commerce and a return on investment. The special benefit at issue therefore is commerce-related. None of the Venice BID programs are useful to a property used solely as the owner's residence and not for commerce; the potential that they may be used for commerce is not enough. Such properties are not fairly distinguished from those residential zoned properties conclusively presumed not to benefit from the services funded through the assessments. Sts. & Hy. Code §36632(c).

Therefore, property owners who use their property exclusively as their own residence — which would exclude loft owners who operate a business out of their residence — cannot be included in the BID assessment. This is true even if they otherwise derive a special benefit from the Clean and Safe Programs because there is no business purpose to that special benefit. These residential property owners are entitled to a return of their assessment.

In making this ruling, the court assumes that the residential property owners living in a commercial zone are doing so lawfully. That is, the fact that the City has zoned a particular area as commercial does not preclude residential living. The court also assumes that the City will be able to ascertain which properties are used exclusively by their owners as a residence as opposed to some commercial use of the property. If it cannot do so, that fact could bear on the outcome. The court will discuss this issue with counsel at hearing.

5. The Venice BID's Boundaries

Petitioners attack the Venice BID's boundaries as gerrymandered. The "borders of the district should be fairly even and there must be an honest and sincere attempt to include with the district properties among which there is some equality of benefit." Safeway Stores, Inc. v. City of Burlingame, (1959) 170 Cal.App.2d 637, 650. The Engineer's Report admits that all of the City and State-owned parcels fronting Ocean Front Walk will not specially benefit from the assessment. AR 25. The Engineer's Report does not state why these parcels were included in the boundaries, and the western boundary could easily have been drawn to exclude them. Petitioners conclude that the inclusion of these government parcels points to an orchestration of

the boundaries to obtain the votes necessary to establish the Venice BID, which is unlawful gerrymandering. Pet. Op. Br. at 19-20.

In the relevant Venice Beach commercial area, the City included non-residentially zoned properties that receive a special benefit from the Venice BID's services. The Engineer's Report explained the rationale behind the BID's boundaries, which naturally include publicly-owned properties. AR 850-51. The BID's boundaries are irregular because they coincide with City boundaries, the ocean, and zoning in the area. AR 850. The western boundary consists of the City and State-owned parcels along the Venice public beach and the Pacific Ocean. AR 850. The western boundary is irregular because it includes parcels developed with public uses (sports/recreation venues, parks and public parking) or uses occupied by or available for business concessions and kiosks. AR 850. The northern boundary is determined by the City's border with Santa Monica. AR 850. The eastern boundary coincides with the end of commercial and industrial zoned parcels and the beginning of parcels zoned solely residential. AR 851. The southern boundary coincides with the centerline of Venice Boulevard and is determined by zoning and properties zoned solely residential. AR 850.

Respondents adequately explain why the Venice BID's boundaries include the government-owned parcels. The Venice BID includes only commercial, industrial, and publicly owned properties in the Venice Beach area and the only excluded properties are those that are zoned exclusively residential. Exclusion of the government parcels would violate Prop 218, which expressly states that publicly-owned parcels "shall not be exempt from assessment unless the agency can demonstrate by clear and convincing evidence that those publicly-owned parcels in fact receive no special benefit." art. XIID §4(a). The government-owned properties on the western edge of the District in fact receive special benefits and their exclusion would be improper. See *Tiburon, supra*, 180 Cal.App.4th at 1057 (boundaries are dictated by which properties receive special benefits). The exclusion of publicly-owned parcels along the Venice Beach boardwalk would have impermissibly excluded parcels that receive the same Safe and Clean program benefits as privately-owned properties. AR 871. These parcels will not benefit from the commercial-oriented District Identity Programs and were excluded from that portion of the assessment. AR 871. The publicly-owned parcels with commercial activities or uses (e.g., public parking) would benefit from the District Identity Programs and were assessed in the same manner and at the same rates as commercial parcels. AR 871.

The City has met its burden to show the Venice BID's boundaries were drawn in accordance with the properties that would receive special benefits.

F. Conclusion

The Petition for writ of mandate is granted in part. Only the portion of the assessment directed to properties used by their owner exclusively as their residence is unlawful. A writ shall issue directing a refund of that portion of the assessment and Petitioners are entitled to a declaratory judgment to that effect. In all other respects, the Petition is denied.

Petitioners' counsel is ordered to prepare a proposed judgment and writ, serve them on Respondents' counsel for approval as to form, wait ten days after service for any objections, meet and confer if there are objections, and then submit the proposed judgment along with a declaration stating the existence/non-existence of any unresolved objections. An OSC re: judgment is set for April 12, 2018 at 9:30 a.m.

G. Supplemental Briefing

At the February 27, 2018 hearing, the court stated that it was interested in the interplay between Prop 218 and the BID law to the extent that they speak to the residential property issue. Whitley Decl. Ex. A, p.27. The court asked the parties to discuss whether residential property owners should have to pay assessments for commercial property benefits. Whitley Decl. Ex. A, p.26.

1. Marlene Okulick Declaration

Petitioner Okulick and her husband are the owners of property located at 602 Hampton Drive, Venice, CA 90291 situated in the Venice BID. Okulick Decl. ¶2. In 1994, they applied to change the zoning designation of their property from “M-1” to “Artist in Residence” because Okulick’s husband is an artist. Okulick ¶3. After two years and various meetings, the City provisionally approved their application and they received the “Artist in Residence” designation. *Id.*, Ex. A. Although art is created at Okulick’s residence, no business is conducted there and it is not open to the public. Okulick Decl. ¶4.

2. Daniel M. Whitley Declaration

One of the government-owned parcels in the Venice BID is zoned commercial and the remainder are zoned “Open Space” or some other non-commercial use. Whitley Decl. ¶2. The commercial-zoned property is assessed for all of the services provided by the Venice BID. *Id.*

Other parcels in the BID are designated C1, C2, or M1. Whitley Decl. ¶3. A parcel designated C1 or C2 can be used exclusively as a residence provided that the dwelling is otherwise legal. *Id.* A parcel cannot be used exclusively as a residence in an M1 zone. *Id.*

The City has no way of definitively determining if businesses actually operate at a location at any given time. Whitley Decl. ¶4. The only relevant records possessed by the City are those filed with respect to business taxes, but many businesses do not register to pay these taxes with the City. *Id.* Many businesses also register with the City intending to operate therein but never actually begin to conduct business. *Id.* Other businesses, such as those which rent three or fewer residential units, are not required to register with the City. *Id.*

The City Clerk does not and cannot investigate the “actual use” of parcels in the Venice BID. Whitley Decl. ¶5. The City Clerk can and does investigate the allowed uses under the City’s zoning code and issues regarding property lines and boundaries to ensure that the Engineer’s Report supporting the Venice BID is accurate. *Id.*

The Department of Building and Safety also has a limited ability to investigate the actual use of a property. Whitley Decl. ¶6. In order to conduct an investigation, a BDS inspector would need the consent of the occupant, a reasonable belief of a hazard requiring immediate inspection, or an Inspection Warrant subject to court issuance. *Id.* The City estimates that courts would only grant the City \$356 as compensation for the costs of such investigations and that this sum would be less than the full cost of the investigation. *Id.*

The City does not know what parcels in the Venice BID are zoned for commercial or industrial use but are instead used exclusively as residences. Whitley Decl. ¶7. Whitley researched Okulick’s property. *Id.* Okulick’s property is located in an area zoned for M1, which includes commercial and light industry uses but excludes solely residential uses of property. *Id.*, Ex. B. The parcel should only have been approved for use as an “Artist in Residence” if it is used as a “live-in” studio where art is created and sold. Whitley Decl. ¶9.

Occasionally, parcels in BIDs undergo a zoning change from residential to commercial or from commercial to residential during the life of the BID. Whitley Decl. ¶10. Such changes are discovered because the City Clerk is notified by the property owner, the BID, or some other party. *Id.* Upon notification, the Office of the City Clerk will investigate and then de-activate or activate that parcel as warranted. *Id.*

3. Interplay between Prop 218 and the BID Law⁵

Petitioners contend that Prop 218 protects individual taxpayers, not abstract properties. Supp. Resp. at 2. They argue that art. XIID requires BIDs to provide an actual benefit to the taxpayer's property as it is being used, not merely a theoretical benefit to the property as it is classified by the local agency. *Id.* In support, Petitioners cite to procedural aspects of art. XIID, which prescribes the manner in which local agencies must inform parcel owners of a proposed assessment. *Id.*⁶

Petitioners contend that these pre-formation procedures require local agencies to justify to each taxpayer why he or she must pay assessments. Supp. Resp. at 3. Petitioners argue that these procedural rights empower the individual taxpayer to oppose an assessment that does not provide a benefit to him. *Id.* Petitioners also cite a portion of art. XIID section 4(a): "No assessment shall be imposed on any parcel which exceeds the reasonable cost of the proportional special benefit conferred on that parcel." (emphasis added). Petitioners argue that this text shows that the correct inquiry is whether each particular parcel receives a proportional benefit, necessarily requiring an inquiry as to how that parcel is used. Supp. Resp. at 3.

Petitioners' position is unpersuasive. They only have shown that Prop 218 protects residential property owners in commercially-zoned districts by grant of individual taxpayer empowerment – *i.e.*, property owners cannot be assessed prior to notice and opportunity to protest the assessment, and the agency must demonstrate the existence and proportionality of special benefits to owners in a legal action contesting the assessment's validity. This showing does not speak *directly* to the pertinent issue: whether a valid assessment can apply to residential properties in commercially-zoned districts.

⁵ Respondents' supplemental requests for judicial notice (Exs. A-C) are granted. Evid. Code §452(b).

⁶ The procedures for assessments are set forth in art. XIID section 4, which requires all assessments to be supported by a detailed engineer's report prepared by a registered professional engineer certified by the State of California. art. XIID §4(b). This provision requires that owners of identified parcels with the district shall be given written notice by mail of (1) the proposed assessment, (2) the total amount chargeable to the entire district, (3) the amount chargeable to the owner's particular parcel, (4) the duration of the payments, (5) the reason for the assessment, and (6) the basis upon which the amount of the proposed assessment was calculated. art. XIID §4(c). The notice shall also include the date, time, and location of a public hearing on the proposed assessment. *Id.* Additionally, this provision requires that the agency mail to owners of identified parcels a ballot on which the owner may indicate his or her name, reasonable identification of the parcel, and his or her support or opposition to the proposed assessment. art. XIID §4(d). The public hearing upon the proposed assessment must be conducted not less than 45 days after mailing the notice to owners of the identified parcels. art. XIID §4(e).

Respondents persuasively argue that special benefits are conferred on commercially zoned properties regardless of their use. Supp. Br. at 1. The term “special benefit” means a particular and distinct benefit over and above general benefits conferred on real property located in the district or to the public at large.” art. XIID §2(i) (emphasis added); *see also* Sts. & Hy. Code §36615.5 (same). The BID’s services themselves are the special benefits conferred on the assessed parcels. *Dahms, supra*, 174 Cal.App.4th at 723.

As Respondents argue, the BID’s special benefits are provided to real parcels regardless of whether the property owner actually adjusts his or her activities to take advantage of them because they are conferred on the real property pursuant to art. XIID section §2(i)) when the services are rendered. Supp. Br. at 2. Respondents persuasively compare residential use of commercially zoned property to business property that is vacant; both illustrate the landowner’s choice not to take advantage of the commercial opportunities afforded. *Id.*⁷

When the BID Law was enacted in 1994, Sts. & Hy. code section 36634(b) read as follows: “Properties in private residential use, or that are zoned for agricultural use, are conclusively presumed not to benefit from the improvements and service funded through these assessments, and shall not be subject to any assessment pursuant to this part.” Resp. RJN Ex. A, p.11 (emphasis added). In 1996, this provision was amended as follows: “Properties zoned solely for residential use, or that are zoned for agricultural use, are conclusively presumed not to benefit from the improvements and service funded through these assessments, and shall not be subject to any assessment pursuant to this part.” Resp. RJN Ex. B, p.18 (emphasis added); *see also* RJN Ex. C, p.26 (2003 amendment renumbering section 36634(b) to 36632(c) but otherwise retaining pertinent language).

As Respondents contend, the court’s tentative ruling resurrects the superseded version of the statute because it would hold that no special benefit is conferred on commercial properties that are used as a residence. Supp. Br. at 3. Of course, the Legislature cannot override a constitutional provision. But, as the court previously noted, the 2014 amendments to the BID Law was intended to provide the Legislature’s guidance for the BID Law’s interaction with art. XIID (Sts. & Hy. Code §36601(h)), and that there is a strong presumption in favor of the Legislature’s interpretation of art. XIID. *Green v. Future Two, supra*, 179 Cal.App.3d at 742-43. As enacted and amended, the BID Law requires evaluation of a property’s zoning, not use, in determining the special benefit conferred. There is no basis for the court to conclude that this statutory law is inconsistent with art. XIID’s permitted assessments for special benefits conferred on real property.

Thus, the Venice BID’s special benefits are those conferred on real property located in the district. The proper inquiry is whether the special benefits are conferred on a parcel irrespective of whether the owner is actually capitalizing on the benefit. In this sense, the benefit

⁷ Respondents less persuasively argue that Article XIID cannot be interpreted to require that the Engineer determine what benefits are conferred on individual properties based on actual, rather than permitted, uses of the land because the undertaking may require the city or local agency to draw on investigative resources which are not feasible. Supp. Br. at 2. While it is true that Article XIID should be interpreted to be reasonably practicable, that fact does not foreclose an interpretation based on use, as shown by Respondents’ proposed alternative remedies. *See* Supp. Br. at 5.

is not prospective, but present and realizable. Since properties zoned for commercial use are provided special benefits under the BID Law, it is immaterial that the owner is using the parcel as a residence. Prop 218 is not violated when property in the Venice BID zoned as commercial but used for residential purposes is nonetheless assessed.

H. Conclusion

The petition is denied. Respondents' counsel is ordered to prepare a proposed judgment, serve it on the Petitioners' counsel for approval as to form, wait ten days after service for any objections, meet and confer if there are objections, and then submit the proposed judgment along with a declaration stating the existence/non-existence of any unresolved objections. An OSC re: judgment is set for May 10, 2018 at 9:30 a.m.